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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 JOEY TORREY,

11 Plaintiff,

No. CIV S-05-0388 LKK DAD P

12 vs.

13 FEDERAL BUREAU OF  
14 INVESTIGATION LAS VEGAS  
NEVADA DIVISION, et al.,

ORDER AND

15 Defendants.

FINDINGS AND RECOMMENDATIONS

16 \_\_\_\_\_/  
17 Plaintiff is a state prisoner proceeding pro se with this action. The case is before  
18 the court for rulings on several motions and requests filed by plaintiff and on defendants' motion  
19 to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

20 PROCEDURAL HISTORY OF THE CASE

21 Plaintiff commenced this action by filing a pleading in which he sued the Federal  
22 Bureau of Investigation Las Vegas Nevada Division and three FBI agents. As observed in this  
23 court's order filed May 4, 2005, plaintiff alleges as follows: On January 4, 2002, after serving 24  
24 years in state prison on a term of 25 years to life, he was released on bail pending appeal from an  
25 order granting his petition for writ of error coram nobis; while free on bail, plaintiff decided to  
26 box professionally and signed a promotional deal with a Las Vegas-based boxing company;

1 immediately after signing the deal, and while training in San Diego, he was contacted by the FBI;  
2 defendants Bennett and Schultz (later identified as Schlumpf) met with plaintiff in Las Vegas and  
3 asked him to gather information on the fixing of fights and other criminal activity in the boxing  
4 community; plaintiff was promised by these defendants that the Los Angeles County District  
5 Attorney's Office would not challenge plaintiff's writ and he would not be returned to prison;  
6 plaintiff agreed to the proposal and was subsequently informed that the agreement had been  
7 approved by FBI headquarters and that the U.S. Attorney's Office had struck a deal regarding  
8 plaintiff with the Los Angeles County District Attorney's Office; plaintiff signed a contract that  
9 provided him with a monthly salary, an expense account, an apartment, cars, jewelry, and a  
10 percentage of any assets seized; over a period of 16 months, plaintiff worked with defendant  
11 Manzione, a New York City Police Department detective on loan to the FBI, to infiltrate the  
12 inner circle of the promotional company and organized crime; plaintiff was repeatedly assured  
13 that he would not return to prison; in September of 2003, the California Court of Appeal in Los  
14 Angeles affirmed plaintiff's sentence and plaintiff was sent back to prison.

15           Plaintiff contends that the defendants failed to protect him, failed to provide the  
16 state court with information concerning his service to the FBI, and allowed the Los Angeles  
17 County District Attorney's Office to appeal his release; prior to his return to custody, plaintiff  
18 met with defendants Schlumpf and Bennett in Las Vegas and was told that their investigation  
19 was over and he was no longer needed; defendant Manzione told plaintiff that "they" had lied to  
20 plaintiff and to him, that he would tell the truth if asked, and that plaintiff should be placed in the  
21 Federal Witness Protection Program. Plaintiff sought millions of dollars in damages as well as  
22 declaratory and injunctive relief.

23           Prior to the court's screening of the pleading, plaintiff mailed copies of it to  
24 individual defendants Bennett, Schlumpf, and Manzione. No summons has been issued, and  
25 service of the complaint was not effected in accordance with the requirements of Fed. R. Civ. P.

26 4.

1 On April 14, 2005, the United States Attorney's Office, having reviewed the  
2 pleading mailed to the three individual defendants, filed a certification that the three individuals  
3 were acting within the scope of their employment as employees of the United States at the time  
4 of the incidents alleged in the pleading. On the same date, the United States Attorney's Office  
5 filed a notice of substitution of the United States of America as defendant in place of the three  
6 individual defendants for purposes of plaintiff's common law tort claims but not for the  
7 constitutional claims alleged against the three individuals.

8 On May 5, 2005, the court granted plaintiff thirty days to pay the required filing  
9 fee or submit an application to proceed in forma pauperis. Plaintiff filed an in forma pauperis  
10 application on May 13, 2005, and the application was granted on May 23, 2005.

11 The district court is required to screen the complaint in any civil action in which a  
12 prisoner seeks redress from a governmental entity or officer or employee of a governmental  
13 entity.<sup>1</sup> 28 U.S.C. § 1915A(a). The court must identify cognizable claims and dismiss any  
14 portions of the complaint that are frivolous or malicious, fail to state a claim upon which relief  
15 may be granted, or seek monetary relief from a defendant who is immune from such relief. See  
16 28 U.S.C. § 1915A(b). The plaintiff in this case is a prisoner who seeks redress from a  
17 governmental entity and three employees of that entity. Accordingly, the undersigned screened  
18 plaintiff's pleading and determined that it fails to state any cognizable federal claim. By order  
19 dated May 4, 2005, plaintiff's complaint was dismissed with leave to amend, and plaintiff was  
20 granted thirty days to file an amended complaint.

21 On June 1, 2005, the court received plaintiff's motion for an expansion of time to  
22 file his amended complaint. On June 6, 2005, the court received plaintiff's amended complaint  
23 with a proof of service indicating that the document was delivered to prison authorities for

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25 <sup>1</sup> For purposes of § 1915A, a prisoner is "any person incarcerated or detained in any  
26 facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations  
of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary  
program." 28 U.S.C. § 1915A(c).

1 mailing on June 2, 2005. Under the prisoner mailbox rule, plaintiff's amended complaint was  
2 constructively filed on June 2, 2005. Because the amended complaint was filed within thirty  
3 days after May 4, 2005, plaintiff's motion for expansion of time will be denied as unnecessary.

4 On June 29, 2005, defendants filed their motion to dismiss the amended  
5 complaint. Plaintiff filed a timely motion for an extension of time to August 18, 2005, to  
6 respond to defendants' motion. However, plaintiff did not file opposition to the motion within  
7 the time requested and did not request any further extension of time. The July 12, 2005 request  
8 will be denied as moot.

9 PLAINTIFF'S APPLICATION TO FILE A SECOND AMENDED COMPLAINT

10 On July 15, 2005, plaintiff filed an application for leave to file a second amended  
11 complaint but did not submit a proposed second amended complaint. In his application, plaintiff  
12 first asserts that he "was not aware that he was to use his facts; and documents as exhibits" but  
13 then claims he merely "forgot" to attach his exhibits to his amended complaint. (Pl.'s  
14 Application for Leave to File Second Am. Compl. filed July 15, 2005, at 1.) Plaintiff contends  
15 that his "statement of facts is without merit minus all of [his] exhibits" and argues that he "truly  
16 needs to amend his complaint with existing material." (*Id.*) Plaintiff's application does not refer  
17 to defendants' motion to dismiss and does not suggest that the proposed addition of exhibits will  
18 serve to resolve any ground for dismissal asserted by the defendants.

19 On July 21, 2005, plaintiff submitted a proposed second amended complaint that  
20 includes 22 exhibits. The allegations of the pleading itself appear to be identical to those  
21 contained in the first amended complaint except for the addition of citations to the exhibits and  
22 two pages of new allegations concerning plaintiff's adherence to the terms of the parties'  
23 agreement, defendants' breach of the agreement, and plaintiff's correspondence with various  
24 agencies and persons about defendants' conduct. (Compare Pl.'s Second Am. Compl. at 10:25  
25 through 12 with Pl.'s Am. Compl. at 10:25.) In the proposed second amended complaint,  
26 plaintiff has also expanded his prayer for relief to include requests for (1) an order requiring his

1 present custodians to single cell him, (2) an evidentiary hearing, (3) discovery of FBI documents  
 2 and materials, and (4) “a full investigation.” (Compare Pl.’s Second Am. Compl. at 19-21 with  
 3 Pl.’s Am. Compl. at 17-19.) In addition, plaintiff has deleted his improper request for damages  
 4 arising from alleged illegal confinement and has reduced all sums of money sought from  
 5 defendants. (Id.)

6 Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend  
 7 his or her pleading “once as a matter of course at any time before a responsive pleading is  
 8 served.” Fed. R. Civ. P. 15(a) (emphasis added). Plaintiff has already amended his pleading  
 9 once and may further amend “only by leave of court or by written consent of the adverse party.”  
 10 Id. In general, “leave shall be freely given when justice so requires.” Id. “Valid reasons for  
 11 denying leave to amend include undue delay, bad faith, prejudice, and futility.” California  
 12 Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988).

13 Plaintiff has not opposed defendants’ motion to dismiss and has not requested  
 14 leave to amend for the purpose of curing the defects asserted by defendants in their pending  
 15 motion. It does not appear that the defects at issue can be cured by plaintiff’s proposed  
 16 amendments. Plaintiff’s application for leave to file the proposed second amended complaint  
 17 will be denied without prejudice to a renewed motion if defendants’ motion to dismiss is denied.

#### 18 PLAINTIFF’S MOTION FOR INJUNCTIVE RELIEF

19 In a motion for temporary restraining order filed August 2, 2005, plaintiff asks the  
 20 court to (1) direct defendants to inform state prison officials immediately of plaintiff’s past  
 21 assistance in a federal government investigation and (2) order state prison officials to single cell  
 22 plaintiff immediately and until this litigation is completed.

23 Plaintiff argues that the proposed orders are needed to secure his personal safety  
 24 and the safety of his legal and confidential documents. Plaintiff asserts that his history as an FBI  
 25 informant was revealed by FBI sources and resulted in his being stabbed while he was housed in  
 26 the Los Angeles County Jail. Plaintiff states that upon arrival at Mule Creek State Prison he

1 informed prison staff of his history as an FBI informant and of his need for a single cell “for  
2 peace of mind and safety concerns” but prison officials knew nothing about his assistance to the  
3 government and accused him of not telling the truth. Plaintiff admits that prison officials  
4 subsequently contacted law enforcement officers and confirmed plaintiff’s statements, but he  
5 complains that prison officials still did not single cell him. Plaintiff argues that he is in danger of  
6 immediate and irreparable injury, that defendants will not be substantially harmed by the order he  
7 seeks, and that there is an overwhelming likelihood that he will win a final judgment on the  
8 claims in his amended complaint. Plaintiff contends that he will suffer harm if he continues to be  
9 celled with other inmates who may read his confidential documents, inform other inmates of the  
10 contents of the documents, and take or destroy the documents. Plaintiff asserts that his efforts to  
11 give notice to the adverse parties “are described in Exhibits 9, 10, and 11 attached.” (Pl.’s Brief  
12 in Supp. of Pl.’s Mot. for T.R.O. at 5.) No exhibits were attached to plaintiff’s brief, and no  
13 proof of service was submitted with the motion.

14 In a letter received by the Clerk of the Court on September 30, 2005, plaintiff  
15 states that prison officials “have been as kind as to single-cell me to date” but worries that they  
16 will not continue to do so if he fails to obtain a court order requiring prison officials to assign  
17 him to a single cell.

18 In general, the purpose in issuing a temporary restraining order is to preserve the  
19 status quo pending a fuller hearing. Because plaintiff’s motion does not seek orders preserving  
20 the status quo, the court will construe plaintiff’s request as a motion for preliminary injunction.  
21 The legal principles applicable to requests for injunctive relief are well established. To prevail,  
22 the moving party must show a likelihood of success on the merits of his claims and the  
23 possibility of irreparable injury if injunctive relief is not granted, or he must demonstrate that  
24 serious questions are raised and the balance of hardships tips sharply in his favor. Coalition for  
25 Econ. Equity v. Wilson, 122 F.3d 692, 700 (9th Cir. 1997); Oakland Tribune, Inc. v. Chronicle  
26 Publ’g Co., 762 F.2d 1374, 1376 (9th Cir. 1985). These two formulations represent points on a

1 sliding scale, with the focal point being the degree of irreparable injury shown. Oakland Tribune,  
2 762 F.2d at 1376. “Under any formulation of the test, plaintiff must demonstrate that there exists  
3 a significant threat of irreparable injury.” Id. In the absence of that minimum showing, the court  
4 need not reach the issue of the plaintiff’s likelihood of success on the merits. Id.

5 In general, the court cannot issue orders against persons or entities who are not  
6 parties to the suit pending before the court. See Zenith Radio Corp. v. Hazeltine Research, Inc.,  
7 395 U.S. 100, 112 (1969) (holding that it was error for the lower court to enforce an order against  
8 a nonparty without having determined, “in a proceeding to which [the nonparty ] was a party,”  
9 that the nonparty acted in concert with the defendants and received actual notice of the order by  
10 personal service or otherwise). If a preliminary injunction is entered with respect to prison  
11 conditions, the injunction “must be narrowly drawn, extend no further than necessary to correct  
12 the harm the court finds requires preliminary relief, and be the least intrusive means necessary to  
13 correct that harm.” 18 U.S.C. § 3626(a)(2).

14 Here, plaintiff is in the custody of state officials, and those officials are  
15 responsible for plaintiff’s safety and housing. Plaintiff has not demonstrated that he provided  
16 state officials, who are not parties to this action and who are not represented by the United States  
17 Attorney’s Office, with any notice of his motion for injunctive relief. Moreover, plaintiff  
18 subsequently notified this court that prison staff investigated plaintiff’s allegations concerning his  
19 involvement in a federal investigation, confirmed his involvement, re-housed plaintiff in a single  
20 cell, and that he is presently housed in a single cell. It appears that plaintiff’s motion for  
21 preliminary injunctive relief is moot with regard to both of the orders requested by plaintiff.

22 To the extent that plaintiff seeks an injunction requiring state officials to single  
23 cell him until this litigation is ended, plaintiff’s motion lacks merit. The parties to this action do  
24 not include any state officials, and the federal defendants who are parties to this action are not  
25 responsible for plaintiff’s safety and housing. If state prison officials fail to meet plaintiff’s  
26 safety needs, plaintiff’s remedy is to seek relief by means of the CDC’s administrative appeal

1 process and, if necessary after exhausting that process, file a lawsuit against the officials who are  
2 failing to protect him from harm.

3 For all of the reasons discussed above, the undersigned will recommend that  
4 plaintiff's motion for injunctive relief be denied.

5 DEFENDANTS' MOTION TO DISMISS

6 I. Standards Applicable to Motions Brought Pursuant to Rule 12(b)(1) and (6)

7 A motion brought pursuant to Rule 12(b)(1) is a challenge to the court's  
8 jurisdiction over the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). Since federal  
9 courts are courts of limited jurisdiction, a case presumably lies outside the jurisdiction of the  
10 federal courts unless proven otherwise. Kokkonen v. Guardian Life Ins. Co. of America, 511  
11 U.S. 375, 377 (1994). When a defendant moves to dismiss for lack of subject matter jurisdiction,  
12 the plaintiff bears the burden of proof that jurisdiction exists. Id.; Sopcak v. Northern Mountain  
13 Helicopter Serv., 52 F.3d 817, 818 (9th Cir.1995).

14 If a Rule 12(b)(1) motion attacks the complaint on its face, the court considers the  
15 allegations of the complaint to be true, and the plaintiff enjoys "safeguards akin to those applied  
16 when a Rule 12(b)(6) motion is made." Doe v. Schachter, 804 F. Supp. 53, 56 (N.D. Cal. 1992).  
17 If the motion makes a factual attack on subject matter jurisdiction, the motion is a challenge to  
18 the truth of the jurisdictional facts underlying the complaint, and the court does not presume the  
19 factual allegations of the complaint to be true. Thornhill Publ'g Co. v. General Tel. & Elecs.  
20 Corp., 594 F.2d 730, 733 (9th Cir.1979). "Faced with a factual attack on subject matter  
21 jurisdiction, the trial court may proceed as it never could under Rule 12(b)(6) . . . . No  
22 presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material  
23 facts will not preclude the trial court from evaluating for itself the merits of jurisdictional  
24 claims." Id. (quotation marks and citation omitted). The court may consider evidence such as  
25 declarations and testimony to resolve factual disputes concerning the existence of jurisdiction.  
26 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).



1 The purpose of a motion to dismiss under rule 12(b)(6) is to test the legal  
 2 sufficiency of the complaint.” North Star Int’l v. Arizona Corp. Comm’n, 720 F.2d 578, 581 (9th  
 3 Cir. 1983). Dismissal of the complaint “can be based on the lack of a cognizable legal theory or  
 4 the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica  
 5 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (citing Robertson v. Dean Witter Reynolds, Inc.,  
 6 749 F.2d 530, 533-34 (9th Cir. 1984)).

7 In considering a motion to dismiss for failure to state a claim, the court accepts as  
 8 true all material allegations in the complaint and construes those allegations, as well as the  
 9 reasonable inferences that can be drawn from them, in the light most favorable to the plaintiff.  
 10 Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v. United States, 915 F.2d 1242, 1245  
 11 (9th Cir. 1990). However, the court need not accept as true conclusory allegations, unreasonable  
 12 inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618,  
 13 624 (9th Cir. 1981). Pro se pleadings must be held to a less stringent standard than those drafted  
 14 by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). In general, a motion to dismiss for  
 15 failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can  
 16 prove no set of facts in support of his claims that would entitle him to relief. Hishon, 467 U.S. at  
 17 73; Cervantes v. City of San Diego, 5 F.3d 1273, 1274-75 (9th Cir. 1993).

## 18 II. Analysis

19 Defendants seek dismissal of all of plaintiff’s claims, including any claims for  
 20 breach of contract, any common law tort claims, and any constitutional tort claims.

### 21 A. Breach of Contract Claims

22 Defendants observe that suits against federal agencies and officers acting in their  
 23 official capacities are considered suits against the United States because any judgment against the  
 24 agencies or the officers would necessarily be paid out of the United States Treasury. (Defs.’ Mot.  
 25 to Dismiss at 4, citing Dugan v. Rank, 372 U.S. 609, 620 (1963), and Stafford v. Briggs, 444  
 26 U.S. 527, 542 n.10 (1980).) Defendants assert that the exclusive remedy for any breach of a

1 contract entered into by a federal agent lies in an action against the United States under the  
 2 Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). (Defs.’  
 3 Mot. to Dismiss at 5-6, citing Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 941  
 4 (5th Cir. 1999).)

5           The Tucker Act provides that the United States Court of Federal Claims has  
 6 jurisdiction over “any claim against the United States founded either upon the Constitution, or  
 7 any Act of Congress or any regulation of an executive department, or upon any express or  
 8 implied contract with the United States, or for liquidated or unliquidated damages in cases not  
 9 sounding in tort.” 28 U.S.C. § 1491(a)(1). The Little Tucker Act provides that the United States  
 10 District Courts have concurrent jurisdiction with the United States Court of Federal Claims over  
 11 any civil action or claim “not exceeding \$10,000 in amount.” 28 U.S.C. § 1346(a)(2).  
 12 Defendants argue that a plaintiff who brings an action seeking more than \$10,000 may not  
 13 remain in district court unless he waives all recovery in excess of \$10,000. (Defs.’ Mot. to  
 14 Dismiss at 5, citing North Side Lumber Co. v. Block, 753 F.2d 1482, 1484-85 (9th Cir. 1985),  
 15 and Stone v. United States, 683 F.2d 449, 451 (D.C. Cir. 1982).)

16           By the amended complaint in the present case, plaintiff seeks to recover millions  
 17 of dollars. In his proposed second amended complaint, plaintiff seeks to recover sums that total  
 18 an amount well in excess of \$10,000. Plaintiff has not opposed defendants’ motion to dismiss  
 19 his breach of contract claims and in any event has not agreed to waive all recovery in excess of  
 20 \$10,000. The undersigned finds that any breach of contract claims contained in plaintiff’s  
 21 amended complaint should be dismissed without prejudice to the pursuit of damages from the  
 22 United States in the United States Court of Federal Claims.<sup>2</sup>

23 /////

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24  
 25 <sup>2</sup> “The Tucker Act empowers district courts to award damages but not to grant injunctive  
 26 or declaratory relief.” Lee v. Thornton, 420 U.S. 139, 140 (1975). See also Price v. United  
States Gen. Servs. Admin., 894 F.2d 323, 324 (9th Cir. 1990) (“The Act does not . . . authorize  
 the district courts to grant declaratory or equitable relief against the United States.”).

1           B. Common Law Tort Claims

2           Defendants note that some of plaintiff's claims may be construed as stating  
3 common law tort claims. Defendants contend that any such claims, whether against the United  
4 States, the FBI, or the individual agents acting within the scope of their federal employment,  
5 should be dismissed because (2) plaintiff's sole remedy for those claims would be an action  
6 against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., and (2)  
7 plaintiff cannot proceed on FTCA claims unless he filed an administrative claim with the  
8 appropriate agency within two years after the claims arose. Defendants point out that plaintiff  
9 has not alleged the filing of any FTCA claim and assert that the FBI has no record of receiving  
10 such a claim from plaintiff. (Defs.' Mot. to Dismiss at 6-7.)

11           Plaintiff has not opposed the dismissal of any common law tort claims  
12 encompassed by the allegations of this amended complaint, and he has not alleged that he filed  
13 any FTCA claim. The undersigned finds that all common law tort claims encompassed by the  
14 allegations of plaintiff's pleadings should be dismissed with prejudice.

15           C. Constitutional Tort Claims

16           Defendants assert that plaintiff's amended complaint broadly alleges that the  
17 conduct of the FBI agents in reneging on their alleged promise to keep plaintiff out of prison  
18 violated several of plaintiff's constitutional rights. Defendants contend that any constitutional  
19 tort claims against the United States should be dismissed with prejudice because the United  
20 States has not waived its sovereign immunity to claims for monetary damages arising from  
21 alleged violations of the Constitution. (Defs.' Mot. to Dismiss at 7-8, citing FDIC v. Meyer, 510  
22 U.S. 471, 474, 477 (1994).)

23           Defendants argue further that any constitutional tort claims against the individual  
24 FBI agents should also be dismissed with prejudice because there is no Bivens remedy for breach  
25 of oral promise by a federal employee and the sole remedy for such a breach lies in a claim  
26 against the United States under the Tucker Act. (Defs.' Mot. to Dismiss at 8-9.) Defendants

1 contend that Tucker Act jurisdiction extends to all claims that the United States has breached its  
2 agreements and that the existence of this meaningful alternative remedy is a special factor  
3 counseling against the extension of the Bivens remedy to a new context. (Id. at 9-11, citing, inter  
4 alia, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396  
5 (1971), Bush v. Lucas, 462 U.S. 367 (1983), Sky Ad, Inc. v. McClure, 951 F.2d 1146, 1148 (9th  
6 Cir. 1991), and Moore v. Glickman, 113 F.3d 988, 991 (9th Cir. 1997).)

7           Plaintiff has not opposed dismissal of his constitutional tort claims and has made  
8 no showing that the Tucker Act does not provide him with a meaningful alternative remedy. The  
9 undersigned finds that plaintiff's constitutional tort claims arising from alleged breach of promise  
10 should be presented as claims against the United States under the Tucker Act and that such  
11 claims, as discussed supra, must be filed in the United States Federal Court of Claims.

12           Accordingly, IT IS ORDERED that:

13           1. Plaintiff's June 1, 2005 motion for expansion of time to file amended  
14 complaint (docketed as #17) is denied;

15           2. Plaintiff's July 12, 2005 motion for expansion of time to file opposition to  
16 motion to dismiss (docketed as #23) is denied;

17           3. Plaintiff's July 15, 2005 application for leave to file second amended  
18 complaint (docketed as #24) is denied;

19           4. Plaintiff's requests for status of his motion for temporary restraining order,  
20 filed September 26, 2005, September 30, 2005, November 4, 2005, and December 23, 2005,  
21 (docketed as #28, #29, #30, and #32) are denied;

22           5. Plaintiff's November 29, 2005 correspondence with the Attorney General  
23 regarding an investigation and a federal protective order (docketed as #31) will be disregarded;  
24 and

25       ////

26       ////

1 IT IS RECOMMENDED that:

2 1. Defendants' June 29, 2005 motion to dismiss (docketed as #22) be granted,  
3 plaintiff's contract claims be dismissed without prejudice to the filing of an action in the United  
4 States Court of Federal Claims, plaintiff's common law tort claims be dismissed without  
5 prejudice to the filing of a new judicial action after filing an FTCA claim and exhausting his  
6 administrative remedy, and plaintiff's constitutional tort claims be dismissed with prejudice;

7 2. Plaintiff's August 2, 2005 motion for temporary restraining order (docketed as  
8 #26) be denied; and

9 3. This action be dismissed.

10 These findings and recommendations will be submitted to the United States  
11 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
12 fifteen days after being served with these findings and recommendations, any party may file  
13 written objections with the court and serve a copy on all parties. A document containing  
14 objections should be titled "Objections to Magistrate Judge's Findings and Recommendations."  
15 Any reply to objections shall be served and filed within ten days after service of the objections.  
16 The parties are advised that failure to file objections within the specified time may, under certain  
17 circumstances, waive the right to appeal the District Court's order. See Martinez v. Ylst, 951  
18 F.2d 1153 (9th Cir. 1991).

19 DATED: February 21, 2006.

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23 DALE A. DROZD  
24 UNITED STATES MAGISTRATE JUDGE

25 DAD:13  
26 torr0388.mtdmpi